IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1548

CALIFORNIA BREWERS ASSOCIATION, *et al.*,
Petitioners,

v.

ABRAM BRYANT,
Respondent,

and

TEAMSTER BREWERY AND SOFT DRINK WORKERS JOINT BOARD OF CALIFORNIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE UNION RESPONDENTS

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The opposition briefs submitted by Respondent Bryant and his supporting amici disclose fundamental errors in their varied approaches to the issue before the Court. For purposes of this reply, we focus narrowly on three aspects of their arguments. First, we show that § 703(h) is not an exception to Title VII's general prohibitions

against discrimination. Rather it is a definitional provision whose terms, in any event, must be given their ordinary and intended meaning. Second, we cut through our opponents' theoretical arguments to demonstrate that attainment of permanent status through satisfaction of the forty-five week rule is governed by an interaction of the Agreement's industry and plant seniority rules which allocate work opportunities among temporary employees. Length of service principles are controlling. Third, we show that the definitions of "seniority system" proffered by Bryant and his supporters do not aid in resolving the issue in this case, and would produce results in other cases totally inconsistent with Congress' intent in enacting § 703(h).

1. Congress Did Not Consider Systems Of Seniority To Be Inconsistent With Title VII's Overall Purpose To End Discrimination.

Respondent Bryant and his supporting amici insist that tension exists between § 703(h) and Title VII's general prohibitions against employment discrimination; and that the term "seniority system" in § 703(h) must be given a narrow construction (R. Br., at 12; Gov't Br., at 38; NAACP Br., at 10-13; L. Comm. Br., at 18). Their interpretative approach discloses a fundamental misconception of Title VII in general and of § 703(h) in particular. Congress intended to tolerate *no* employment discrimination based on race, color, religion, sex or national origin by covered employers and unions after the effective date of Title VII. Neutral seniority systems were not considered discriminatory. "Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title." 110 Cong. Rec. 7206-07 (1964). Section 703(h) was designed to clarify Congress' understanding that differences in treatment attributable to the operation of a

bona fide seniority system were not unlawfully discriminatory. 110 Cong. Rec. 12723 (1964) (remarks of Senator Humphrey).

No tension exists between § 703(h) and the statutory scheme of which it is a part. As this Court has often recognized, § 703(h) is "a definitional provision" which, together with all other provisions of § 703, "delineates which employment practices are illegal . . . and which are not." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 758 (1976); *Trans World Airlines* v. *Hardison*, 432 U.S. 63, 82 (1977). See also *Teamsters* v. *United States*, 431 U.S. 324, 346-47 (1977). There is no indication that Congress considered the existence of seniority systems and seniority rights inimical to the realization of equal employment opportunity.[1] Rather the legislative history discloses only the broadest possible agreement that rights accrued under bona fide seniority systems should not be disturbed. Title VII's sponsors repeatedly stated that the bill's general prohibitions against discrimination were not intended to invalidate bona fide seniority systems; § 703(h) was added to assure that this congressional intention could not be misunderstood. *Teamsters* v. *United States*, *supra*, 431 U.S. at 352. Accordingly, § 703(h) is not an "exemption," for it did not remove seniority systems from the sweep of statutory commands that other-

[1] See U. Br., at 28-32. The notion that past discrimination could be perpetuated through operation of a seniority system, applying equally to all racial and ethnic groups, surfaced 3 years after Title VII was enacted. See Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 Harv. L. Rev. 1260 (1967). To say that Congress did not regard the perpetuating effects of seniority systems on *past* hiring discrimination to constitute *present* invidious discrimination involves no departure from *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), which held that Congress intended to outlaw "impact discrimination." It has long been recognized that "perpetuation" and "impact discrimination" are two different concepts. EEOC, *Seventh Ann. Rep., 1972*, at 13 (CCH. ed., Aug. 23, 1973); Gov't Br., at 12.

wise would have invalidated them. More accurately, § 703(h) confirmed the inapplicability of Title VII's general prohibitions to bona fide seniority systems.

For these reasons, the canon of statutory construction urged by Bryant and his amici is inapposite. Of course, exemptions from remedial legislation should be narrowly construed as a general rule. *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490 (1945). But this sensible rule was formulated, and has been uniformly applied, in situations where the exemption at issue was in derogation of the main legislative purpose.[2] Since the preservation of seniority rights was not considered by Congress to be in derogation of Title VII's remedial purpose, it is difficult to see how the canon of construction put forth by those supporting affirmance will aid in interpreting § 703(h).

Whatever § 703(h) is called, there can be no justification for construing the words "seniority system" more narrowly than the ordinary meaning they enjoy in the collective bargaining world. This Court has recognized that the protection of seniority rights, as reflected in § 703(h), was a central commitment by congressional sponsors which "cleared the way . . . for the passage of Title VII." *Teamsters* v. *United States, supra*, 431 U.S. at 352. The essence of that commitment was "that seniority rights would not be affected, even where the employer had discriminated prior to the Act." *Id.* at 350. To accord § 703(h) an artificially narrow sweep would amount to "a perversion of the congressional purpose" which could not be more clearly expressed.

> "[T]he congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act." [*Id.* at 353.]

This Court should decline "the invitation to disembowel § 703(h)," *id.* at 353, and construe that section with "due regard to the plain meaning of the statutory language and the intent of Congress." *A.H. Phillips, Inc.* v. *Walling, supra*, 324 U.S. at 493. Properly read, *Phillips*' insistence on a "narrow construction" of the FLSA's retail service exemption[3] reflected this Court's unwillingness, absent contrary congressional intent, to afford the exemption a *broader* meaning than the normal usage of its terms in business and government warranted. Canons of statutory construction, including the principle that exemptions from remedial legislation are to be narrowly construed, aid the Courts in ascertaining legislative intent. They do not constitute rules of law authorizing the Courts to override congressional purposes.

In *Teamsters*, this Court recognized that the immunity Congress accorded to seniority systems extends to all varieties of seniority systems which existed at the time of the Act's passage. "The legislative history contains no suggestion that any one system was preferred." 431 U.S. at 355 n.41. The breadth of Congress' commitment to the preservation of established seniority rights suggests the propriety of construing § 703(h) sufficiently broadly, in light of industrial realities, to accomplish its

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[2] E.g., *Spokane & I.E. R.R.* v. *United States*, 241 U.S. 344, 350 (1915). Much closer in point is *Lodge 1424, International Ass'n of Machinists* v. *NLRB*, 362 U.S. 411, 418 n.7 (1960), where Mr. Justice Harlan declined to view the union security proviso to § 8(a)(3)'s prohibition against discrimination based on union activity, 29 U.S.C. § 158(a)(3), as being in derogation of general employee organizational rights granted by § 7 of the LMRA, *id.* § 157, stating:

> "Had Congress thought one or the other overriding, it would doubtless have found words adequate to express that judgment. It did not do so; it accommodated both interests, doubtless in a manner unsatisfactory to the extreme partisans of each, by drawing a line it thought reasonable. . . ."

[3] Fair Labor Standards Act of 1938, § 13(a)(2), 29 U.S.C. § 213(a)(2).

intended purpose. The position we espouse finds substantial support in *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192 (1977), where this Court declined to give "limited effect" to the protection afforded bona fide retirement plans under the Age Discrimination in Employment Act of 1967. In "the absence of any indication of congressional intent to undermine the countless bona fide retirement plans existing in 1967 when the Act was passed," *id.* at 199, the Court concluded that a narrow construction invalidating some of the plans was not warranted. "Such a pervasive impact on bona fide existing plans should not be read into the Act without a clear, unambiguous expression in the statute." *Id.* at 199.

In the instant case, this Court is called upon to perform the familiar task of discovering the ordinary and intended meaning of statutory language. Congress determined that Title VII would not "destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act."[4] *Teamsters* v. *United States*, *supra*, 431 U.S. at 353. Those rights existed in 1964 under a variety of seniority systems. *Id.* at 355 n.41. Consequently, the meaning of the term "seniority system" in § 703(h) must be ascertained in accordance with the development of the seniority principle in collective

[4] Of course, there can be no valid claim of perpetuation of post-Act discrimination. Post-Act discrimination is directly subject to attack. A timely claim against any such discrimination will entitle the complainant to full relief; an untimely claim of post-Act discrimination cannot be revived through the assertion that a neutral seniority system perpetuates the effects of the discrimination. *Teamsters* v. *United States*, *supra*, 431 U.S. at 347-48. "[T]he operation of a seniority system is not unlawful under Title VII even though it perpetuates post-Act discrimination that has not been the subject of a timely charge by the discriminatee." *Id.* at 348 n.30. See also *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977); accord, *Lodge 1424, International Ass'n of Machinists* v. *NLRB*, *supra*, 362 U.S. 411.

bargaining. Otherwise, employee seniority rights and legitimate expectations that Congress meant to protect will be lost.

2. The Applicability of § 703(h) Turns Upon Consideration Of The Entire Seniority System, Its Industrial Setting, And An Understanding Of Its Component Rules.

At the outset, we again emphasize how critical accrued past service is to Bryant's "perpetuation" theory of this case (see U. Br., at 43-44). There must be a link between past work opportunities, which Bryant claims he was denied, and the attainment of permanent status through satisfaction of the forty-five week rule. If, as the lower Court reasoned, the forty-five week rule is an "all or nothing proposition," in that ability to satisfy the rule is simply a function of competition that begins anew each year (585 F.2d at 427; Pet. App. 11), then discriminatory acts in earlier years would have no effect on that ability. Bryant's Title VII claim would thus fall wholly apart from § 703(h).

To make out his claim, therefore, Bryant must establish three propositions: First, he has to demonstrate that the Agreement's industry and plant seniority provisions, which allocate work opportunities among temporary employees, and which determine who works forty-five weeks in a calendar year, operate with sufficient certainty and predictability to forge a link between his alleged denial of past work opportunities and his present inability to achieve permanent status. Second, he must somehow show that the acquisition of permanent status under the forty-five week rule does not reflect operation of seniority principles, a major inconsistency whose acceptance would deny § 703(h) protection to combination seniority systems. Third, he must convincingly show that the forty-five week rule is not part of the contractual seniority system.

Bryant cannot meet this burden. The rule is an essential feature of the Agreement's combination seniority system, in that it furnishes the means by which industry service is given partial seniority credit at the plant. Moreover, the attainment of permanent status turns directly on an interaction of the Agreement's plant and industry seniority provisions, which allocate those work opportunities determinative of who satisfies the forty-five week rule and who does not.

a. ***The Combination Seniority System Is Designed To Operate In A Multi-Employer Bargaining Unit.***

It is instructive to note that if the Brewery Agreement were applicable to a single establishment instead of a multi-employer, multi-union bargaining unit, there would be no variation whatever from cumulative length of industry service as the controlling measure of seniority rights. Employees would be referred out of the hiring hall in order of their industry service which would be the equivalent of plant service. They would accrue seniority and reach permanent status in strict order of their longevity in the industry, assuming their service was not broken. Yet the unit is not a single-plant unit, and the parties to the Agreement have determined to allow some seniority credit for time served elsewhere in the multi-employer unit. Thus, the seniority system, though it is a single, integrated system, uses a combination of plant and industry service in measuring seniority.

Our main brief sets forth in detail the operation of the combination seniority system (U. Br., at 7-13, 44-47; see also AFL-CIO Br., at 32-35), allowing us to review it briefly here. A temporary employee working under the Agreement accumulates two types of seniority. His industry seniority reflects his total accumulated length of tier service within his classification at all plants in the covered industry, while his plant seniority represents

his total accumulated length of tier service within his classification at a particular plant. Industry seniority determines the temporary employee's opportunity to secure work at any given plant. This is because an opening at any plant not filled by a permanent employee, or by a temporary employee with prior service at that plant, must be offered to the temporary employee with the greatest industry seniority. Following referral, plant seniority will determine whether the temporary employee, in competing with other temporaries within his classification, will be able to secure an available opportunity. For instance, the least plant-senior temporary will be laid off immediately after new employees, while the most plant-senior temporary will be first recalled.

If forty-five weeks of work in a calendar year is available at a plant for any temporary employee, the most senior temporary employee in classification service at that plant has the right to claim the work. Thus, plant seniority governs the opportunity to work forty-five weeks and attain permanent status at a particular plant. Of course, temporary employees need not fulfill the forty-five week rule at one plant. If a temporary employee works at a plant where he does not have the opportunity to work forty-five weeks in a calendar year, his industry seniority determines his opportunity to secure work at a second plant, or a third plant, and thereby satisfy the forty-five week rule by cumulating the time he has worked at different plants. In this manner, opportunities to attain permanent status are allocated on a length of service basis.

Under the combination seniority system, it is at least conceivable that a worker junior in industry service can reach permanent status before a more industry-senior worker and enjoy a higher seniority standing. But this possibility is not in derogation of the seniority principle, however narrowly that principle is applied. For in this situation, the industry-junior worker has succeeded in

fulfilling the forty-five week service rule by virtue of his accumulated plant service. The only way an industry-junior worker, whether black or white, could reach permanent status before one with longer industry service is for the former worker to accumulate more service than the latter during the calendar year. This occurrence, in turn, is possible if the industry-senior worker suffers layoffs for lack of work in the establishments to which he is referred, while the industry-junior worker does not. As shown, the Agreement's seniority referral rules afford industry-senior temporary employees first opportunity for available work, thus stacking the odds heavily in their favor, and minimizing the chances that industry-junior workers will achieve permanent status before them.

Once permanent status is obtained, the employee begins to accrue plant seniority in a higher seniority tier within his classification, and thereby achieves a superior ranking on the plant seniority list. In this way, the forty-five week rule furnishes the mechanism by which an employee's industry service is given partial seniority credit at the plant. The rule is one of the Agreement's provisions determining how service will be accrued and thus credited for seniority purposes. It is integral to the seniority system because, along with related rules, it furnishes the measure of seniority within the applicable unit. The *measure* of seniority, one of the basic components of every seniority system, establishes the order in which employees are ranked on the seniority list.

The Government has taken the position that furnishing the measure of seniority is not enough to qualify a contract provision for § 703(h)'s protections. Being "part of a system with seniority features" is insufficient, the Government insists; the challenged rule itself must contain "the essential elements of the seniority principle" (Gov't Br., at 19-20). While we believe this view is

erroneous, it is clear that the forty-five week rule itself is based on the seniority principle in that, as already shown, the attainment of permanent status is a function of industry and plant seniority. Total industry seniority determines who will have first opportunity to secure employment, but accumulated plant seniority (which governs layoff and recall) is the final determinant of who satisfies the forty-five week rule. In view of the multi-employer nature of the Agreement, there can be no absolute assurance that temporary employees will always reach permanent status in strict order of their industry service. Some departure from this norm is possible due to the importance of plant seniority. Yet this scarcely represents a derogation of the seniority principle because, in these situations, length of plant service is controlling. In sum, permanent status is earned by obtaining work opportunities, whose allocation is determined by an interaction of plant and industry seniority.

Obviously, the combination seniority system is better suited to the multi-employer bargaining unit than either a pure plant or pure industry system of seniority. A pure plant system would be unfair to employees with long industry service, for they would receive no industry credit at the plant, and would have to start over again at each new plant. A pure industry system would be impossible to implement without chaotic "bumping" throughout the California brewery industry.[5] Apart from the administrative burdens involved, such turmoil would prevent employers from retaining employees familiar with work processes, plant rules, and supervisory requirements. The combined industry-plant seniority system

[5] The Agreement enables permanent employees to "bump" (A. 30, § 4(b)), but bumping is limited by the fact that permanent employees are the last to be laid off. "Bumping" would increase drastically under a pure industry seniority system applicable to current temporary employees.

actually chosen is designed to accommodate the many interests of the parties to the Agreement. It is rational for a multi-employer unit and accords with industry practice. *Teamsters* v. *United States, supra,* 431 U.S. at 356.

b. *The Objections To The System Voiced By Bryant And His Supporting Amici Do Not Place The System Outside § 703(h).*

(1) *Hypothesis: Industry-Senior Employees Are Not Invariably Preferred.* A repeated theme in our opponents' briefs is that the system does not reward "cumulative service" because it is possible for an industry-junior employee to achieve permanent status ahead of an industry-senior employee. Industry-senior employees are afforded referral priorities based on their industry service that serve to minimize this possibility. To the extent it does occur, the reason is attributable to the importance of plant seniority, and not because some non-seniority factor has been injected.[6] This Court has twice held that a seniority system can be protected by § 703(h), even though it does not allocate work opportunities on the

[6] The Government maintains that the sole objectionable aspect of the system is that 45 weeks of employment must be earned in one calendar year (Gov't Br., at 27 n.20), and suggests the system would be protected by § 703(h) if total industry service (regardless of when worked) were credited toward satisfaction of the 45-week rule. This view makes little practical sense; it is a construct without basis in the statute or collective bargaining experience. Even if the Government had its wish, in view of the nature of the multi-employer bargaining unit, and the interaction of the Agreement's combined plant-industry seniority rules, there could be no assurance that employees would reach permanent status in order of their industry length of service. The Government's value judgment on this point dramatizes its confusion of "longevity" and length of service seniority principles. It brings to mind Congressman McCulloch's statement on the eve of Title VII's passage: "The bill does not permit the Federal Government to destroy the job seniority rights of either union or non-union employees." 110 Cong. Rec. 15893 (1964).

broadest possible basis. *Teamsters* v. *United States, supra,* 431 U.S. 324; *Trans World Airlines* v. *Hardison, supra,* 432 U.S. 63.

(2) *Hypothesis: The System Can Be Manipulated.* The simple answer to our opponents' contention that the system is "manipulatable" is found in § 703(a) of the Act. Racial manipulation constitutes direct discrimination, and can be remedied without disturbing the seniority system. *Franks* v. *Bowman Transp. Co., supra,* 424 U.S. at 758. The system is protected by § 703(h); its abuse is not protected at all. Besides, the methods of manipulation hypothesized by Bryant are not only far-fetched, they could be used to circumvent any seniority system. The Government's opinion, Br., at 31, that interruptions in the accrual of seniority—caused by layoff under the system in question—should essentially be within employee control is totally unrealistic in light of actual collective bargaining practices (U. Br., at 47-50; AFL-CIO Br., at 15-20).

Relying on the lower Court's opinion, Bryant suggests that production could be shifted from one plant to another by an employer (R. Br., at 22). This surely would be an exceptionally expensive and unrealistic way to discriminate. Moreover, it would not succeed. Unless the shift coincided with a significant drop in production, the seniority referral rules would assure that the most industry-senior temporary employees would have first opportunity to secure the shifted work. With deference to the lower Court (585 F.2d at 427; Pet. App. 11), we simply cannot see how the Agreement can be intentionally manipulated to the detriment of minority workers without violating its seniority provisions, as well as its equal opportunity clause (R. 14, § 55).

Another area of potential manipulation, pointed to by the NAACP (Br., at 49-51), is supposedly found in § 5 (c) (2) of the Agreement, which allows an employer to

reject a referred employee not having recall rights under § 5(c)(1). Temporary workers are referred out of the hiring hall to different employers in accordance with their industry seniority pursuant to work orders for specific numbers of employees (A. 38, 41). There is no gang system under which employers pick and choose among a surplus of employees. If an employer finds a referred individual inappropriate for employment (e.g., due to prior unsatisfactory work), it may reject him and secure another employee from the hiring hall in accordance with industry seniority.[7] A discriminatory rejection under § 5(c)(2) would be remedied in accordance with *Franks* by formulating a "rightful place" remedy for the victim. But this does not affect the system's status under § 703(h). It indicates only that an ability determination that overrides seniority is not protected by § 703(h).[8]

(3) *Hypothesis: The System Is Not Predictable.* Our discussion of the system and its operation demonstrates that it establishes orders of priority to govern competition among brewery employees. These orders of priority, reflected on plant seniority lists and seniority referral lists, vest in employees reasonably well-defined employment expectations. Bryant's main objection is that temporary employees cannot predict with precision when they will attain permanent status (R. Br., at 22-23). This inability, however, is not attributable to the forty-five week rule, but to the scope of the bargaining unit and the manner in which work opportunities are allocated.

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[7] These facts distinguish *Cox* v. *Local 1273, International Longshoremen's Ass'n*, 343 F. Supp. 1292 (S.D. Tex. 1972), aff'd, 476 F.2d 1287 (5th Cir.), cert. denied, 414 U.S. 1116 (1973), and show that the possibility of rejection under § 5(c)(2) is an "ordinary uncertainty" familiar to every employment situation. 343 F. Supp. at 1299. *Cox* has no bearing on the Brewery Agreement. See *Coon* v. *Liebmann Breweries, Inc.*, 86 F. Supp. 333 (D. N.J. 1949).

[8] E.g., *Movement for Opportunitity* v. *Detroit Diesel Div., General Motors Corp.*, 18 [BNA] FEP 557, 569-70 (S.D. Ind. 1978). See also AFL-CIO Br., at 24 n.10.

Furthermore, no seniority system affords absolute certainty and predictability. The economic vitality of his employer, career choices of employees with greater seniority entitlement, automation and similar considerations all affect an employee's prospects. A seniority system establishes priorities based on service time as between employees and insulates employees from decisions by their employer based on other, less certain criteria (AFL-CIO Br., at 20-21). The system involved here accomplishes these goals, and tempers absolute predictability no more than is required by industrial realities.

3. The Definitions Proposed By Respondent Bryant And His Amici Would, In Other Cases, Deprive Obvious "Seniority Systems" Of § 703(h) Protection.

The difficulty in adopting a firm definition of the term "seniority system" is illustrated by Respondent Bryant's attempt to do so (R. Br., at 33). His proposed definition would include "the rules and procedures which define seniority and its methods of calculation, along with those which affirmatively state the business decisions to which the seniority principle applies. . . ." So stated, Bryant's definition supports our position. The forty-five week rule, and the means by which it is fulfilled, quite clearly define "seniority and its methods of calculation" in the California brewery industry.

The seniority principle is not susceptible to definition in abstract terms. Its nature can only be described generally, since the specific form and content of seniority rights are supplied at the bargaining table, and reflect the interests brought to the table by the parties. The correct approach to construing the meaning of "seniority system" used in § 703(h) requires an examination of the system at issue to identify the rules that establish or

control orders of priority among competing employees based on time worked. Adoption of this functional approach, instead of the highly theoretical, value-laden test proposed by Bryant and his amici, will yield several distinct advantages: (1) It is more faithful to the congressional judgment to protect all seniority systems without preferring any particular system. (2) Employee seniority rights and expectations will not be destroyed by exclusion of a rule which profoundly affects seniority rights, but which does not meet abstract definitional criteria. (3) It recognizes the infinite variety of seniority systems that already exist, and will not force management and labor to conform future systems to a particular norm, or otherwise inhibit the flexibility of collective bargaining.

To say that the seniority principle cannot be precisely defined, however, does not mean that its general nature cannot be described. A seniority system has two basic components: the measure of seniority and a definition of which employees are eligible to compete based on that measure. Various rules deal with each component. Rules dealing with the measure of seniority determine how service will be credited for competitive and beneficial seniority purposes. Among these rules are those which determine the type of service to be credited (e.g., company, plant, departmental or job service), how service time is to be calculated or accrued for seniority credit, when seniority begins, and when it is lost or its accrual interrupted. Like the forty-five week rule, and the plant and seniority rules through whose interaction permanent status is attained, rules dealing with the measurement of seniority determine rankings on seniority lists.

As we understand their submissions, Bryant and his supporters would leave outside the protections of § 703

(h) the rules in a seniority system that define which employees are eligible to use their seniority to compete for a given employment opportunity. Thus, Bryant urges that "[r]ules and procedures which limit the application of the seniority principle by excluding some employees from seniority protection . . . are outside the system" (R. Br., at 33 (italics removed)). This aspect of Bryant's definition is deeply troubling. After all, without the rules that determine who may compete there is no system. There is only a measure that can have no application without a known field of competitors.

Of necessity, all seniority systems have some limitation on the field of eligible competitors. In some systems, the determination of eligibility to compete is implicit in the measure of competition. For example, where the measure is departmental seniority, eligibility to compete is by definition limited to the members of a given department;[9] where the measure is job seniority, eligibility is limited to those holding a particular job. We suspect Bryant and his supporters would not seriously contend

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[9] In a departmental system, after all those within a department have exercised their respective seniority rights an opening will result, generally in a bottom level job in the department. *Teamsters* itself describes this basic phenomenon:

> "For competitive purposes, however, such as determining the order in which employees may bid for particular jobs, are laid off, or are recalled from layoff, it is bargaining-unit seniority that controls. Thus, a line driver's seniority, for purposes of bidding for particular runs and protection against layoff, takes into account only the length of time he has been a line driver at a particular terminal. *The practical effect is that a city driver or serviceman who transfers to a line-driver job must* forfeit all the competitive seniority he has accumulated in his previous bargaining unit and *start at the bottom of the line drivers' 'board'*." [431 U.S. at 343-44 (footnotes omitted, emphasis added).]

Normally, departmental seniority systems will include a set of seniority rules for filling the resulting vacancy in the entry-level job in a department (e.g., employees in all other departments might be eligible to compete for it based upon their plant seniority).

that in a departmental or job seniority system the limitation on eligibility to compete implicit in the measure of seniority is not part of the "seniority system" for purposes of § 703(h).

In some seniority systems, the field of eligible competitors is not determined by the applicable measure of seniority. For instance, when Congress enacted Title VII in 1964, there was an apparent "trend . . . toward the use of a single seniority date, usually the date of hire in the company or plant, regardless of the units of seniority application. Ranking within any given unit by date of original hire in the company is becoming more prevalent." Slichter, Healy & Livernash, *The Impact of Collective Bargaining On Management* 117 (1960). This trend has continued. In many industries, unions and employers have negotiated seniority systems in which the departmental unit structure is maintained but within that structure competition takes place on the basis of plant or company seniority. For all except entry-level opportunities in a department, the field of eligible competitors is limited to the incumbent employees in that department; but the measure of seniority for competitions within the department is plant, not departmental, seniority.

Adoption of such systems in complex manufacturing industries enable employers to maintain the safety and efficiency associated with departmental seniority systems, while allowing for greater employee mobility within plants and greater security for longer service employees. They provide more opportunity than would a pure departmental system for an employee transferring from outside a department to advance rapidly to higher level jobs within his new department, since the transferring employee is able to use his total plant service (including the time he spent in his prior department) for competitive purposes within the new department.

It should be manifest that a decision in collective bargaining to utilize a departmental unit structure, but to employ plant seniority as the measure within that structure, is protected by § 703(h) in the same manner as if the measure chosen had been departmental seniority. Whether the system be a pure departmental seniority system, or a plant seniority system where the unit of seniority application is the department, the point for purposes of § 703(h) is that protection of the vested seniority rights of employees requires protection of the fundamental components of the system. That is to say, § 703(h) must be understood to cover the rules establishing the field of eligible competition—those specifying particular jobs or departments as units of seniority application—in addition to rules governing the seniority measure of competition.

The definitions of "seniority system" proffered by Bryant and his supporters will not provide that coverage. For example, in the plant-seniority-within-department system described above, their definitions would leave unprotected employee seniority expectations based on the limitation of the field of eligible competitors to those within the given departments. Contrary to the legislative purpose, and without any warrant in the legislative history, they would have this Court attribute to Congress the "common error" of "failure to think in terms of the total system." Slichter, *et al.*, *op. cit. supra* at 154.

CONCLUSION

For the reasons set forth above, and in our main brief, the decision below should be reversed.

Respectfully submitted,

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